Central Law Journal.

ST. LOUIS, MO., OCTOBER 31, 1913.

A CLOSE CASE AS CALLING FOR STRICTER RULING ON ERROR IN THE LOWER COURT.

The very lengthy, unanimous opinion by the Supreme Court of Iowa in the case of State v. Gulliver, 142 N. W. 949, makes stand out, as seems to us, very prominently the fact, that defendant was tried and convicted in an atmosphere of prejudice that should have made every prejudicial fact take on an importance, that might otherwise have been disregarded.

The Supreme Court was so impressed by the strength of the evidence of an alibi, that the writer of the opinion said: "Speaking for himself alone, the writer of this opinion does not hesitate to say that a reading of the testimony leaves him in such grave doubt upon the possibility of defendant's presence at Orchard on any day of the week prior to Friday—a doubt which necessarily extends to his identity with the person who assaulted the cashier on the following day—that if this court were authorized to try fact questions in criminal cases he would be in conscience bound to vote for an acquittal."

We understand this to mean, that, taking even into consideration that the jury saw and heard the witnesses on both sides and, therefore, presumably were better judges of credibility than this judge, yet the record, if he were allowed to pass upon fact questions, would compel him to vote for acquittal. Under these circumstances, it seems to us, that the judge would be inclined to weigh with the most jealous care everything alleged to have operated against a fair and impartial trial having been accorded to the defendant. This, we think, he did not do. This record bristles with things suggestive of harmful influences surrounding the trial of defendant for an alleged felonious assault upon a resident—presumably prominent as cashier of a bank—but the opinion treats them as if neither singly nor in combination should they be regarded in such a case.

For example, one witness testifying for defendant as to alibi, the only defense offered, said he saw defendant on a train from Chicago on Thursday and was asked by counsel "how much he saw of defendant," at that time. The court ruled out the answer, saying: "I would not take too much time in these details." The Supreme Court said: "There was no error in the ruling or remark, because it was immaterial whether the witness did or did not reap profit from the entertainment. With due respect, this sounds flippant. As the question was one of identity, it was important for witness to show he was not mistaken about seeing defendant. If he had conversed with him, it would have put his veracity squarely in issue, while otherwise the jury might have thought he was mistaken.

Again, it is admitted by the court that state's counsel alluded to the fact of defendant remaining silent at the preliminary trial and argued therefrom that his defense was an afterthought. It is impossible to see why, if defendant's silence on the main trial could not be alluded to, any reference to his silence at a preliminary trial should be tolerated.

Thus the court goes on until it comes to an objection to argument by state's counsel which "has fair support in the record" but which "we hold has been without substantial prejudice," a curious conclusion in the face of a verdict of guilty. The court's inner consciousness seems here involved. This objection was that state's counsel, speaking of a "Mrs. Miller, a woman of unblemished character so far as appears from the record, indulged in a covert suggestion or insinuation reflecting upon her character." The court says: "There was no just occasion for the language and it should not have been used. No doubt counsel themselves will agree that this criticism was just. If the defendant's presence in Chicago up to Thursday morning was an im-

portant fact, its proof did not depend on this witness alone. At least three or four other unimpeached persons testify to substantially the same matter, and even if Mrs. Miller was in any manner discredited, we cannot presume that the jury disregarded the testimony of the others." This is queer argumentation where the entire defense rested upon the jury deciding in a case of irreconcilable conflict among witnesses.

The defendant's counsel impugned the fairness and impartiality of the presiding judge at the trial, which the court overrules, admitting, however, that at times and upon some close questions the court ruled against defendant, when the holding might well have been the other way.

It was also urged that there was public prejudice and the court says: "We may for the purposes of this case assume that public opinion in that community was against the defendant, and it is more than probable that this was reflected in the demeanor and hearing of the attendant crowd of spectators; but there is nothing to show any demonstrations of a character to intimidate the jury." If the court does not virtually admit that there was an unwholesome atmosphere there, we misinterpret what is said, and why it should say that the little things which have been instanced should not be thought probably to have counted for more than if that atmosphere had not been there, we do not understand.

Finally it was claimed that a detective of the bankers' association was overheard by one of the jurors to say that the name given by the alleged assailant just before the assault was the same as that of a character taken by defendant in a drama in some company with which he was connected. This juror made affidavit that he heard this during the trial and also he heard that defendant had been suspected of stealing money. He said, however, he was not affected thereby and it was not mentioned in the jury room. It was further shown that the prosecuting witness talked with one or more of the jurors during the trial on business matters.

We think this record, taken as a whole, carries a strong presumption, that the jurors weighing evidence that was sufficient to convince the court that there ought to have been a verdict of acquittal, were looking for just such circumstances as made the scale turn against the defendant. There was error and it had an ideal field for its prejudicial influence and the argument, that a court applies to a case when every presumption of correctness is with the verdict, should not control where the presumption is the other way. It is gravely to be doubted that defendant had a fair trial and this doubt should have received proper recognition.

NOTES OF IMPORTANT DECISIONS.

ADOPTION—INEFFECTIVE INSTRUMENT CONSTRUED AS CONTRACT.—By the statute of Texas, adoption is a simple process. It is only necessary for the adopting party to file in the office of the clerk of the county court of the county of his residence a statement, acknowledged as deeds are required to be acknowledged, that he adopts another as his legal heir. This instrument shall entitle the adoptee to all of the rights of a legal heir, except that if the adopter have or thereafter shall have a lawfully begotten child, the adoptee shall be limited to one-fourth.

In the case of Thompson v. Watts, 159 S. W. 82, decided by Texas Court of Civil Appeals, an instrument was duly executed as required and filed in the office for adopting instruments. It provided in the first clause that alleged adoptee was adopted as "our legal heir, hereby conferring upon him all the rights and privileges both in law and equity appertaining to this act of adoption," this language being an almost literal transcription from the statute. But then the instrument goes on to say that it is intended "to make him a co-heir with their legal heirs," with the understanding that the adoptee is to get $1,000 more of their property than are the other and remainder of their legal heirs. The adoptee was 5 years old. Eleven years later, the husband of the other adopting party died testate, leaving all his estate to his wife, and when she died 12 years later, the alleged adoptee claimed the entire estate. This was resisted by bro-

thers and sisters and their descendants of the surviving wife.

It was shown that at the time of the adoption no children had ever been born to the adopters and they had reached an age when they did not expect any children to be born to them. The court ruled that the instrument could not have been intended to be an adoption giving all the rights of a statutory adoption and should be given effect as a contract to leave a portion of the property to the alleged adoptee.

It may be conceded there is much authority to support such a position, the consideration resting upon the society and affection of the child. But there was a plain declaration of adoption in the first clause of the instrument and a very vague description about heirs in subsequent clauses. For example, it speaks of "our heirs," when no such description—even if there is waived all question of technicality—would fit anybody, unless there would be supposed an absolutely contemporaneous decease of the adopting parties. No word is said of the survivorship of either of these. Did the instrument, therefore, mean, the alleged adoptee was to have a share with the husband's heirs, if he survived, or with the wife's heirs if she survived, or, when the survivor died, then it was to relate back to first decedent, and leave the division between the supposed adoptee and the heirs of both adopting parties?

If "our heirs" is to be given force it can only mean children or descendants of children, but, taking this sense, the instrument would again offend the statute, because a child cuts an adopted heir's inheritance to one-fourth or less.

But whether the instrument is a valid adoption or a contract to leave the property to the child, it does seem that there is such uncertainty about who should share it with him that he should take the whole. It looks like guessing property on to another to say that the heirs of whoever might be the survivor of the adopting parties should take it. It seems certain a kind of adoption was intended.

DIVORCE—PROBABLE INHERITANCE AS BASIS FOR AMOUNT OF ALIMONY.—It is familiar law that an award of alimony, especially if made payable by installments, is subject to revisal, that is to say the decree remains open for amendment in this regard. Therefore the ruling of Kentucky Court of Appeals in Griffin v. Griffin, 159 S. W. 597, seems the more out of the ordinary in saying that "though it is true that defendant has no estate of his own, yet he is able to work. He is also the only child of his mother and will inherit from her estate. Therefore, not only his probable earnings from his own efforts, but his probable inheritance from the estate of his mother may be taken into consideration." For which is cited in Meier v. Meier, 92 S. W. 314, 28 Ky. Law Rep. 1359, 4 L. R. A. (N. S.) 907. Therefore says the court: "Taking these facts into consideration we conclude that plaintiff is entitled to alimony in the sum of $500, payable in four installments of $125 each in one, two, three and four years from the entry of the judgment on the return of this case."

This would seem to be judicial encouragement of post obit, going a little further than anything we have read about in English literature, as in such cases there were vested remainders waiting enjoyment in possession. The court is to be commended for its sympathy more than for anything else.

WHITE SLAVE ACT—CONCUBINAGE AS BEING WITHIN THE STATUTE.—In the case of U. S. v. Flaspoller, 205 Fed. 1006, decided by District Court Eastern District of Louisiana, the indictment charged that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation and concubinage with accused.

It was claimed that the words "for the purpose of prostitution, debauchery or other immoral purpose" meant in prostitution, but the court thought that this would make the words "other immoral purpose" of no effect, and instead they ought to embrace sexual immorality, as analogous to prostitution. It was thought the legislation is "but a further declaration of the public policy of the United States as originally expressed in the immigration acts."

All of us are acquainted with the rule ejusdem generis, but when this is here applied it cannot be confined to "prostitution," but it is larger in aspect because of the use of the word "debauchery." Thus decoying a woman across a state line for opportunity to debauch against her will would be in the purview of the statute, and yet this would be as far outside of making commerce out of sexual immorality, as getting her to go willingly into concubinage. We refer to previous discussion in 77 Cent. L. J., 261.

SOME UNCONSTITUTIONAL ASYLUM AND INSANE LAWS.

Pecuniary interests, especially at a time when commercialism has become a sort of money madness more injurious to society at large than the type of insanity for which asylums have been built, are allowed to overshadow the fundamental interests upon which personal liberty, constitutional government, the feeling of personal safety and general security depend. But if there is any class in the community likely to waive the objects which appeal merely to narrow selfishness for the sake of safeguarding those ends the attainment of which promote the general welfare and universal happiness of man, it surely is that class which is made up of lawyers and judges. For that reason an article upon a fundamental question of constitutional liberty and law which has heretofore received almost no attention from those who should be most interested in it may well demand attention.

While the common law of England seems to have taken little notice of insanity as marking a peculiar status within its restraining provisions, it is certain that at the time of Blackstone the treatment of the insane and the law and procedure relating thereto was less perilous to citizens generally than the procedure provided for by some of the present day statutes. "As to idiots and lunatics," says the great commentator of the eighteenth century, "the king himself used formerly to commit the custody of them to proper committees in every particular case; but now, to avoid solicitation and the very shadow of undue partiality a warrant is issued by the king under his Royal sign manuel to the chancellor or keeper of his seal to perform his office for him, and if he acts improperly in granting such custodies, the complaint must be made to the king himself in council, but the previous proceedings on the commission to inquire whether or no the party be an idiot or lunatic, are on the law side of the court of Chancery, and can only be redressed if erroneous, by writ of error in the regular course of law."[1]

Here we have a provision for an inquiry in open court in all cases where insanity is alleged, with the right of appeal, a procedure similar to that which safeguards the individual when charged with crime; a procedure which marks practically the whole distinction between an arbitrary despotism and a constitutional government, a procedure guaranteed by the great charter, of 1215, and by those which followed it. Compare this now with the provisions of a statute adopted by the Ontario Legislature in the Spring of 1913. The language of this specimen of legislation by legislators supposed to be responsible to electors voting by ballot the single case in which secrecy in connection with the discharge of a public duty has been defended as justifiable, is cunningly devised to strike the careless reader as a guarantee of protection against imprisonment in a hospital for the insane, while its effect or manifest tendency is to destroy not merely the obstacles which positive prohibitions place in the way of unlawful imprisonment, but the deeper underlying safeguards of a sound sentiment of justice and love of liberty. The whole statute should be carefully studied as illustrative of the most pernicious tendencies of an unsound democracy. Section seven is all that can be quoted here. It reads as follows:

"Admission to Hospitals For The Insane."

"No person shall be admitted into any hospital except as a voluntary patient or upon the warrant of the Lieutenant Governor, without certificates of two legally qualified medical practitioners, accompanied by the family history in the prescribed form, and the financial and estate history in the prescribed form, and upon notice having been received from the Superintendent of the said Hospital that there is a vacancy for the patient."

(1) Bl. Comm. B. 111, p. 427.

Paraphrased in accordance with its purpose and effect this statute might thus be rendered: "Any citizen may be unlawfully imprisoned in an insane asylum, provided an enemy desiring such imprisonment, can secure from two unprincipled doctors exparte certificates, made without the knowledge or suspicion of such citizen, certifying that he is insane, with such reference to his family history as will suggest that it has been inquired into especially if his financial and estate history indicate that his estate may be safely shared among the conspirators concerned."

This sort of legislation may be fittingly described as "treasonable." For whatever powers the tribunal which enacted it possesses, these powers cannot be legally exercised under the British Constitution, or any patterned after it, excepting in the open and in a manner free from fraud. Government by discussion is the principle which, in the British Constitution, underlies all others. It is its life and soul, and where discussion is suppressed, or conducted in a manner intended to procure an act of parliament by which the citizen can be deprived of his common rights the whole spirit of the British Constitution is set at nought, the legislature is used as a tool by its enemies in ambush, who would convert all the machinery of constitutionalism into means for perpetrating frauds upon the people. It was legislation of this character which Lord Coke had in mind when he declared that if an act of parliament is against common right, or repugnant or impossible to be performed the common law will control it and declare such act void.

Yet all the safeguards of the written constitutions of the United States of America have not sufficed to prevent the enemies of liberty attempting to introduce these treasonable acts into American jurisprudence as a part of the law of the land. It will suffice to instance the attempt made in the legislature of Rhode Island:

"Insane persons," (runs the language of an act less manifectly fraudulent than the Ontario one) "may be removed and placed in Butler Hospital, or state asylum for the insane, if they can be there received, and if not in any other curative hospital for the insane of good repute in this state, managed under the supervision of a board of officers appointed under the authority of this or some other state, by their parents or parent, or guardians if any they have, and if not, by their relatives and friends, and if paupers by the overseers of the poor of the towns to which they are chargeable; but the superintendent of said hospitals, shall not receive any person into his custody in such case, without a certificate from two practicing physicians of good standing known to him as such, that such person is insane."

In view of their historical antecedents such statutes could of course only remain operative in a country whose citizens had either ceased to desire freedom protected by law, or had ceased to have the character necessary to maintain it. Rhode Island had not sunk so low; and in case of Doyle, Petitioner, 16 R. I. 537, the Supreme Court was asked to, and did declare this species of treason ineffectual and void.

Fortunately for England, one of her ablest novelists had the courage to portray the false imprisonments, the tortures, the murders and the terrorism perpetrated in that country under cover of its insane laws, and the testimony of one of her greatest philosophers can be cited to prove the substantial truth of the portrayal.[2] The auda-

(2) The description given by Charles Reade, in "Hard Cash," of the horrible outrages perpetrated upon sane men imprisoned in lunatic asylums during the middle portion of the nineteenth century may by many be thought to exaggerate the facts. But the careful reader of Mill's Essays on Liberty and Nature, written several years before Reade's novel, will come to a different conclusion. The danger incurred by one who dared openly to denounce these outrages at that time may be inferred from the following: "Nowhere, (except in some monastic institutions is diversity of taste entirely unrecognized; a person may without blame either like or dislike, rowing or smoking, or music, or athletic exercises, or chess, or cards, or study, because both those who like each of these things, and those who dislike them, are too numerous to be put down. But the man,

city of the men who procured the passage of these laws warns us how weak is the foundation upon which liberty rests even in those countries where we have been taught to regard it as most secure. The forms of law have very little restraining influence upon a people who will permit imprisonment under the pretext of insanity, and even the forms of constitutional procedure are shattered by a statute authorizing the imprisonment of men upon an exparte certificate, not even sworn to, and the making of which for the deliberate purpose of fraud and malicious imprisonment is not even nominally forbidden by the act, but on the contrary is in every way encouraged by it.

Another class of insane laws not directly aimed at constitutional government are a sort of fungus growth from the "expert" witness, an institution which has brought such discredit upon criminal procedure. To this class belong those laws which provide for the imprisonment in insane asylums of men acquitted of the crime of murder on the ground of insanity. A statue of the state of Michigan (Number 168 of the laws of 1873) was of this character; but at that time Michigan was favored with that greatest of all political blessings, a court composed of judges of the highest ability and integrity; and when called on to determine the legality of the imprisonment of one who had been declared not guilty by a jury influenced by quack doctors, legally qualified as "experts" they performed their duty, as was their custom in a manner calculated to instruct the people in the art of self government. The Statute in question (wrote Judge Campbell) entitled "an act to provide for the custody and safe keeping of persons who are tried for murder and other high crimes, and are acquitted by reason of insanity," provides in substance that when the defense of insanity is set up in the cases provided for the jury shall find specially whether the respondent was insane at the time the alleged crime was committed, and if acquitted on that ground the verdict shall so declare. In such case the court is to sentence him for confinement in the insane hospital of the state prison until discharged in the manner pointed out. . . .

"There can be no reason to doubt the propriety of making provision to secure to such unfortunate persons protection and care in such a way as to prevent them injuring or being injured, if they are dangerous or in need of seclusion. The state has an ultimate guardianship over non compotes in cases where it is necessary.

"But inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance, and one which especially involves judicial oversight. In this country where all legislation must be within constitutional limits and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. Any involuntary control or seclusion is imprisonment and that is only justified when enforced under valid laws. Every person has a right at all times to resort to the courts to have the legality of restraint determined. . . .

"There is nothing in this law or elsewhere which could compel the performance of the functions necessary to release a sane person committed to the insane asylum. The inspectors of the prison act or not as they see fit. Neither the prisoner nor his friends can compel action. . . .

and still more the woman who can be accused either of doing 'what nobody does,' or of not doing 'what everybody does,' is the subject of as much depreciatory remark as if he or she had committed some grave moral delinquency. Persons require to possess a title or some other badge of rank, or of the consideration of people of rank, to be able to indulge somewhat in the luxury of doing as they like, without detriment to their estimation. To indulge somewhat, I repeat, for whoever allow themselves much of that indulgence incur the risk of something worse than disparaging speeches—they are in peril of a commission de lunatico, and of having their property taken from them and given to their relatives." Mill's Essay on Liberty, p. 122, 3.

"But the more serious difficulty is in the nature of the proceedings themselves. In the first place the prisoner is sent into confinement without any legal investigation as to his condition at that time, when he may be perfectly sane and when having been acquitted he is entitled to all the privileges of an innocent man. There may be a very long interval between the offense and the trial.

"Having been so secluded from the right all others are excluded from the power of resorting to any effective means or any means whatever of securing a judicial inquiry into his sanity. Neither judge nor expert has any power under our constitution to select his own means and process of enquiry and pass exparte upon the liberty of citizens. The proceedings contemplated by this statute are not only inquisitorial and exparte, but the officers selected . . . have no power to act until the inspectors choose to call them. It particularly leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors. A more dangerous scheme and one more entirely opposed to the constitutional provisions securing to every one the protection of due process of law could hardly be devised.

"It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has been allowed to go, under the fanciful theories of incompetent and dogmatic witnesses who have brought discredit on science, and made the name of experts unsavory in the community." Underwood v. People, 32 Mich. 1.

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A TRANSITIONAL CHANGE—ITS DANGERS AND ITS DEMANDS.

Senator P. J. McCumber delivered a very thoughtful address to the Michigan Bar Association at its 1913 meeting which contained many wise observations and suggestions. Senator McCumber recognizes as does Prof. Pound in his remarkable article in 77 Cent. L. J. 219, l. c. 229, that there are great sociological changes taking place, centering principally around the idea that the individual as well must be protected from being overcome and overburdened by superior mental forces as by superior physical forces. This is a growing public conception and is ever present in many arguments now being made by lawyers in the effort to sustain legislation like the Workmen's Compensation Law. But while this changing conception is going on in the public mind it becomes the duty of the lawyer and the judge to see that the changes necessarily to be effected in the law by this conception shall not affect seriously other important principles and institutions. This is the principal thought in Senator's McCumber's address from which we quote as follows:

"This exciting and unstable condition of the country is not normal and cannot last. It is the fever that attends the throes of a birth into new conditions. That we are passing through a period of great internal change no thinking man can deny. Customs and usages, hoary with age, industrial and commercial, are passing away. They must and should yield to the demand for a social system that will more equally distribute the products of this enlightened human endeavor, the comforts, luxuries and wealth of the country. Justice demands this greater equality. As, many centuries ago, we reached a stage in our evolution which demanded the protection of the physically weak against the physically strong, so to-day we have reached a further advanced state in our complex industrial and commercial condition when men of average acumen must be protected against those who have developed a special capacity in the unscrupulous gathering of the nation's wealth, to the end that the benefits of our advanced civilization may lighten the hearts, increase the comforts and lessen the burdens of all the people.

"The great and imminent danger is, that in our haste—our endeavor to work a de-

sired change—we shall be led, not only into the abandonment of great fundamental principles of government, necessary for the perpetuity of our country and its institutions, but also into a paternalism or socialism, which, destroying or eliminating the incentive for individual exertion for supremacy, will, in the end, lead to general retrogression."

Senator McCumber then proceeds to deal with the plausible demand that the majority of the people should submit to no shackling of their wishes. This demand the Senator regards as exceedingly insidious and dangerous, and he handles the theme with great clearness and effect. The Senator says:

"But I am meet with this question: Should not the majority rule at all times. and should we not abolish a constitutional provision that operates to prevent the immediate exercise of the will of that majority whenever it chooses to exercise it? Let thousands of years of recorded political history answer that question. That history has demonstrated that a majority may be as tyrannical as a single tyrant. It has always been the majority in numbers that has taken the accused from the hands of the legal authorities and hanged or burned him at the stake. It has always been the majority that has been responsible for all the atrocious massacres in the name of religion that have blackened the pages of history. It has always been the majority that has stifled free speech. It has always been the majority that has denied religious liberty. Every paragraph in our Constitution is a guaranty to protect the minority against the majority; and if that guaranty is to be made as elastic as the changing emotions of the majority, then it ceases to be a guaranty and the minority again is solely at the mercy of the passions and prejudices of the majority, and political or religious intolerance may reassert itself in this land of the free.

"This new theory demands the recall of judges. I have known of judges in my life who were lacking in the highest judicial integrity. Improper men have sometimes been appointed and sometimes elected to these positions. It is the weakness of all forms of government, republican or monarchical, but the vast majority, the great body of our judges, are honest, conscientious and capable; and we had a thousand times better suffer a brief while because of a mistake in the selection of a single judge from a single district, than suffer all the time the worse than anarchy that would result from the destruction of the independence of the judiciary of the whole country. We ask our candidates for judicial position the two questions: First, are you learned in the law? Second, have you that judicial temperament, that high sense of honor and justice, and the courage necessary to apply that law strictly according to its terms and the evidence in the case? But this new theory of government says to the judge: You are not to decide the case according to the law that has been given by your predecessors. You are not to decide it according to weight of evidence in the case, but according to the view that the majority who have never read the evidence may take of the subject, and if you fail to do this, we will recall you. This new theory says to the public: Override the Constitution whenever it does not conform to your present view; recall your judges whenever they obey the law rather than the clamor of those who have no knowledge either of the law or of the evidence upon which it is based. Such a theory sounds the death knell of all constitutional government. It destroys every sense of justice and makes a mockery of law. It substitutes the undigested and often prejudiced judgment of what constitutes a temporary majority for law and order. It points with unerring finger towards anarchy and national destruction. God pity this country when any man, though the whole world be against him, cannot stand under the dome of the temple of justice and demand his rights according to the Constitution and the law of the land.

"To whom can the country look to lead the minds of the people back to an appreciation of the old safeguards of liberty, except those whose life's labors and whose life study have proven the necessity for and endeared them to that mightiest instrument of all the ages, the Constitution of the United States." A. H. R.

MASTER AND SERVANT—PRESUMPTION OF DUE CARE.

GREENWOOD v. BOSTON & M. R. R.

Supreme Court of New Hampshire. Grafton. June 27, 1913.

88 Atl. 217.

In an action for the death of a railroad employee who was struck by moving cars while cleaning snow from a switch, where there was no testimony as to how the accident happened, no inference of the decedent's care can be drawn from the instinct of self-preservation.

PEASLEE, J. (1) The plaintiff's evidence tends to show that Greenwood was struck by moving freight cars while he was at work in the defendant's employ clearing snow from a switch. He was aware that the cars were near him and likely to be moved, and had been told to look out for them. He was a man of considerable experience in this work and familiar with the locality. No one saw the accident, and there was no testimony as to how it happened. There was evidence that the weather was cold, windy, and somewhat stormy and that fresh snow upon the track made the cars run with less noise than when the track was clear. His failure to obey the injunction to look out for the cars had a part in causing the accident, and the question here is whether there is any evidence upon which to base a finding that while so acting, or failing to act, he was in the exercise of ordinary care. Various theories are suggested as to why he did noi get out of the way; but no one of them is more probable than another, unless the weight of a presumption of careless conduct is added to the thories which are in the plaintiff's favor.

(2) It is urged that an inference of care on Greenwood's part should be drawn because of the absence of motive to be careless, and from evidence that he was a careful man. It is now settled in this jurisdiction that no inference of the decedent's care can be drawn from the instinct of self-preservation. Wright v. Railroad, 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832, 124 Am. St. Rep. 949.

(3) The evidence upon the question of Greenwood's habit was that one witness "never see but what he was careful about his work—always attended to his work"—and never saw him do anything that attracted the witness' attention as being careless. Another witness testified that he did not know whether Greenwood was a careful or careless man, and that from what the witness knew he would consider Greenwood careful. The substance of this evidence is that Greenwood was an ordinary man. It does not go beyond that, or show any fixed habit, or give rise to any legitimate inference of care, where it would not be drawn as to any man whose personal characteristics were unknown. Such general testimony is not sufficient to support a finding of a habit of care in a particular situation. Gibson v. Railroad, 75 N. H. 342, 74 Atl. 589.

(4) The rule here is that it is "competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it." Parkinson v. Railroad, 61 N. H. 416, 417, and cases cited. The distinction is that between habit and character. Evidence of habit, as to involuntary acts, is admissible, while as a general rule evidence of character is not. State v. Railroad, 62 N. H. 528, 549, 550. The doctrine that general character for care or negligence should be admitted "is maintained in a few jurisdictions only, and has been expressly repudiated in many. Wig. Ev. § 65, and authorities there reviewed.

Without the presumption of care in the particular instance, the plaintiff's case as to his decedent's conduct fails. The nonsuit was properly ordered.

Exception overruled. All concurred.

NOTE.—*Instinct of Self-Preservation as Affording Presumption of Due Care.*—The instant case has some, but not the weight of, authority on its side and hardly, we believe, has the proposition often been stated so baldly as therein found. This manner of statement, however, we think is the only correct way, the cases which balance

presumption of care by defendant against that of care by plaintiff not accurately defining the situation. We instance cases hereinafter, as they have been found by us.

In Collins v. Star Paper Mill Co., 143 Mo. App. 333, 344, 127 S. W. 641, the court instructed the jury that in the absence of any evidence to the contrary (decedent) is presumed to have been in the exercise of ordinary care and to have been free from contributory negligence at and prior to his death; that the burden of proving such negligence, if any, on his part devolves on defendant, etc. An objection being made Kansas City Court of Appeals said: "This objection is not well founded . . . as in the absence of such negligence the law justly presumes he was in the exercise of ordinary care," citing Moberly v. Ry. Co., 98 Mo. 183; Weller v. R. R. Co., 164 id. 180; Smiley v. R. R. Co., 160 id. 629.

The first cited of these cases was not a death case, and it was held error for the court to instruct that there was any presumption of this kind while submitting the question whether care or negligence on the occasion in question might have been fairly found." With that evidence before them, it was calculated to give the jury a wrong impression of its effect to say that a presumption of care then existed in plaintiff's favor. We do not hold that a reference to a disputable presumption would be in all cases erroneous. But we are of opinion that, on the facts presented, it should not have been made here." It seems inferrable that the presumption is quite weak and a *prima facie* case for plaintiff is not to be deemed made out, if it may be thought that he ought to and could go more fully into circumstances of the happening of an injury and does not do so. This seems the view of the court in explaining this ruling in a later case where it said: "It is evident that the opportunities for knowledge in such a case must affect the weight of this presumption." Lynch v. St. Ry. Co., 112 Mo. 420, 434. This was an action for death, and the evidence showed there were eye-witnesses to the occurrence. And so in a much more recent case decided by St. Louis Court of Appeals, Connelly v. R. R. Co., 133 Mo. App. 310, where the presumption is said to be invocable or to be referred to in an instruction only when there is "no evidence one way, or the other." This was an action for loss of goods.

The case of Smiley v. R. R. Co., *supra*, was a passenger case and where the doctrine *res ipsa loquitur* was applicable, but even in that it was said the presumption obtained only in the absence of proof to the contrary. In Weller v. R. R. Co., *supra*, *"absence of any evidence"* is stressed as a necessary predicate for invoking the presumption. This was a crossing case in which intestate was killed. It was said: "The presumption must be indulged that deceased did look and listen before attempting to cross the track, that is, that he was in the exercise of proper care."

In Hanna v. Ry. Co., 213 Pa. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344, there was a non-suit in the trial court, and the Supreme Court in reversing in a case, where intestate was killed at a crossing, said: "The evidence does not disclose what the deceased did immediately before starting over the crossing. It does show that he had stopped and looked at the ice house, again at the battery wall, and still again at the bridge. These facts conclusively show that he had exercised the greatest care possible under the circumstances until he reached the bridge. What he did after leaving the bridge is only a matter of conjecture or inference. Under these circumstances, he is entitled by the settled rule of law to the presumption that he did his duty, and this presumption can only be overcome by testimony showing that he failed to observe the precautions required by law." Further along it was said: "His course of action on his way to the crossing added to the legal presumption that he exercised due care and makes a particularly strong case in favor of the plaintiff." On the whole this case supports the Missouri rule, that is to say, the presumption obtains in the absence of proof to the contrary and it may be fortified by evidence immediately before, and, logically, we suppose, weakened thereby or possibly destroyed.

In a note in 4 L. R. A. (N. S.) to this case it is said the general doctrine supported by the above cases has been frequently declared and there are cited therefor cases from U. S. Supreme Court, from Arkansas, Delaware, Iowa, Kansas, Oregon, Michigan and Missouri. In California the doctrine is expressed somewhat more mildly, though it would seem that the range of evidence to give it place is more extended. Thus in Gay v. Winter, 34 Cal. 153, it was ruled that in the absence of any direct proof the jury are permitted to infer ordinary care on the part of deceased from all the circumstances of the case, his character and habits and the natural instinct of self preservation.

In Waldron v. R. Co., 71 N. H. 362, 52 Atl. 443, the absence of direct evidence bearing on the question of care of deceased, all being known is that a killing occurred at a crossing, it was ruled that the general instinctive disposition of men to avoid fatal injury may be taken into account by the jury. This disposition, however, was said to have its only office to furnish a test for one's acts and not of itself to prove the exercise of due care.

In Tolman v. R. Co., 98 N. Y. 202, 50 Am. Rep. 649, the court speaks with a like character of caution. It asserts that the burden of establishing freedom from contributory negligence may be successfully borne, though there were no eye witnesses to the accident, and even though the exact cause and manner of its occurrence were unknown, provided that the accident might reasonably have occurred without the negligence of deceased. In N. Y. Supreme Court it was said that in cases of death where there are no eye witnesses, the rule of strict proof of freedom from negligence is relaxed. Piney v. R. Co., 58 N. Y. Supp. 797, 41 App, Div. 158, affirmed in 166 N. Y. 616, 59 N. E. 1129.

In another N. Y. case it was said: "In case of a death accident at a railroad crossing, it must often happen that the circumstances immediately preceding it. and the acts and conduct of the deceased are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient, than where the injured person was alive and competent to testify." The case, it was held, should have been non-suited because there was no evidence tending to show that there was freedom from negli-

gence. Rodrian v. R. Co., 125 N. Y. 526, 26 N. E. 741. This rule often would not help a plaintiff unless a greater latitude were also allowed, as for example as shown in Gay v. Winter, *supra*, and in the case next here following.

In Kansas it can be shown that decedent was generally careful and sober and previously exercised care at the crossing, as a means of repelling inference of negligence. Mo. P. R. Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 837.

Massachusetts, Indiana, Maine seem in accord with the case here published as see Livermore v. Fitchburg R. Co., 163 Mass. 132, 39 N. E. 789; Indiana B. & W. R. Co. v. Greene, 106 Ind. 279. 6 N. E. 603, 55 Am. Rep. 756; Day v. B. & M. R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

In Sixth Circuit Court of Appeals there was quoted an excerpt from Looney v. Met. R. R. Co., 200 U. S. 480, 50 L. ed. 564, that: "The negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption of the performance of duty attends the defendant as well as the person killed." Then it is remarked that: "Where the testimony leaves the question unanswered and shows that any one of several things may have induced the accident, for one or more of which the defendant is responsible, and for others of which he is not, it is not permissible to speculate between the several causes and to find that the negligence of the defendant was the real cause, in the absence of satisfactory foundation in the testimony for that conclusion." Smith v. Ill. Cent. R. Co., 200 Fed. 553. This case goes even beyond the excerpt it quotes, which merely offsets one presumption against another, but seems to prevent any weight whatever being given to instinct of self-preservation in a case where some negligence against defendant may permissibly be drawn, but where it is not shown to be the proximate cause of death.

In a late case in Michigan where there was a directed judgment for defendant, and there were no eye witnesses to an accident causing death, the Supreme Court said: "The court evidently overlooked the line of decisions of this and other courts holding that, in the absence of proof tending to show the contrary, where a person is killed by an accident to which there were no eye witnesses, the presumption of the law is that he was in the exercise of due care. Adams v. Iron Ceffs. Co., 78 Mich. 277, 44 N. W. 270, 18 Am. St. Rep. 441, and cases cited." Van Doorn v. Heat, 160 Mich. 199, 125 N. W. 11.

As tending to show that the excerpt quoted in Smith case, *supra*, was pushed too far seems the case of Balto. Ry. Co. v. Landrigan, 191 U. S. 462, 48 L. ed. 262, where an instruction by the trial court that, in the absence of all testimony showing "whether deceased stopped, looked and listened before going upon the track. the presumption would be that he did," was approved, the court saying: "We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions based on human feelings or experience that have more foundation than that expressed in the instruction objected to." This excerpt is quoted in Korah v. C. R. I. & P. Ry. Co., 127 N. W. 529, in a case decided by Iowa Supreme Court.

It seems to us that all courts, which go upon the theory of there being opposing presumptions of care on the part of plaintiff and defendant, do not satisfy. A plaintiff might be generally a careless man in his duties and yet be instinctively as alert to save his life as any other person. Duty by plaintiff concededly may be offset by duty by defendant, so far as presumption goes, but additionally there is instinct of self-preservation to reinforce the presumption of duty by plaintiff. It seems that the weight of decision is against the case here annotated. C.

ITEMS OF PROFESSIONAL INTEREST.

A JURIST AND HIS OATH.

It has been charged time and time again by distinguished jurists and sundry grand juries that many of the witnesses that appear in court or before the inquisitorial body have little regard for the oath they are required to take when with uplifted hand they swear "to tell the truth, the whole truth and nothing but the truth." On the other hand there are those who will and do speak the truth on the witness stand even if the statement is directly against them, having much regard for their oath. The other day this subject was being discussed by a number of lawyers including H. K. White, one of the best known members of the Birmingham Bar, who related an instance in which Judge John H. Miller of the city court did some "tall" swearing.

Judge Miller is one of the most popular judges of the city court of Birmingham and one of the ablest. As a practitioner, he gained much distinction, especially in chancery pleading and practice. Some years ago he was employed by a large corporation of the Birmingham district as special counsel to defend a suit in the chancery court. The suit involved title to a desirable tract of land worth about $15,000. He successfully fought the case through the chancery and supreme courts and rendered a bill for his fee, making it $3,000. The president of the company thought the charge rather high and wrote Judge Miller as follows:

"Birmingham, Ala.,

"Dear Judge Miller: Our company fully appreciates the valuable and successful services rendered for us by you in our recent important land case in the chancery court, but we do not understand your inclosed bill for $3,000 as a fee. We assume that you have made a mistake in your figures, as the land is not worth

more than $15,000 and the bill you have rendered is one-fifth the entire value of the land. Ten per cent is the usual charge for collecting a claim, and we do not think we should be asked to pay more than 10 per cent of the value of the property involved. We are therefore inclosing our check for $1,500 and returning your bill, which we will thank you to correct and return to us receipted. Yours very respectfully,

——————— Company,
"By ———President."

"——— Company,
"Birmingham, Alabama.

"Gentlemen: Yours of Friday, the 13th, inclosing to me your check for $1,500 and returning my bill for fee of $3,000 is just received. You say you assume that I made a mistake in my figures in rendering bill for $3,000. You are correct, and I thank you for calling my attention to it. I intended to render bill for fee of $5,000, but inadvertently made a figure 3 instead of a 5. I herewith return corrected bill for $5,000 and also your check for $1,500, which I could not think of accepting as a full fee for trying a case in the chancery court, even where the value of property involved might be far less than it was in your case. Kindly send me check for $5,000 in full payment of my fee, and oblige, yours truly JOHN HEARST MILLER.

The corporation refused to pay the bill and as Judge Miller refused to take any less, suit was brought in the circuit court by the judge to recover his fee. The case came to trial before Judge John C. Pugh when he was on the circuit bench. Judge Miller took the stand and related the numerous and valuable services he had rendered as special counsel for the corporation. Mr. Blank, the eminent counsel for the corporation, took him in hand for cross examination. After going into the details of the services rendered, he said: "Judge Miller, will you kindly explain to this court and the jury the reason you made such an exorbitant charge of $5,000 for a fee in this case?" Judge Miller hesitated a moment, then gravely answered: "Mr. Blank, I thought the reason would be plain to you or any member of the bar. I admit it is a very high fee, but as you insist on my stating the reason for such a high charge, I can only say it is because I am the greatest chancery lawyer in the state of Alabama."

Mr. Blank was too much overcome to proceed further and the trial ended with a judgment in favor of Judge Miller. After the trial was over and as Judge Pugh and Judge Miller were leaving the courtroom together the former said: "John, that was a pretty tall statement you made on the witness stand, that you are the greatest chancery lawyer in the state. There are some good chancery lawyers here, you know. There's Ed Campbell and Cabiniss and Latady and Harry Sims and several others."

Judge Miller replied: "Yes, I know it was a pretty strong statement and it made me feel rather snobbish to sit there and make it, but what else could I do when asked the question direct. Great Heavens, man, I was under oath."

CHAS. H. MANDY.

Birmingham, Ala.

CORRESPONDENCE.

THE PADDING OF TEXT BOOKS WITH FOOT-NOTES.

Editor Central Law Journal:

Recently I had occasion to need some books on public utilities and purchased: 1—Pond on Public Utilities, 2—Whitten on Valuation of Public Service Corporations, and 3—Wyer on Regulation, Valuation and Depreciation of Public Utilities. The first, with 1080 pages, occupies 3½ inches shelf room, the second, with 838 pages, 2 inches, and the third, with 313 pages, 3-8 of an inch, being on India paper. Aside from this last mentioned modern improvement, which may be said to be in its experimental stage, Mr. Wyer's book contains what seems to me a progressive step in lawbook writing. The authorities he cites in his text, from books, magazines and reported cases of courts and commissions, appear but once. He prints the list and gives each authority a number, and wherever this authority is cited, referred to, or quoted from, in the text, it is printed by its number.

This simple arrangement saves more space than appears at a first glance. In Whitten each case is cited, that is, printed, on an average of four times, and in Pond three times. Without examining the text in detail as to authorities cited, other than reported cases, an estimate will show that if Whitten had followed Wyer's plan, a saving of 75 pages would have resulted, and in Pond 100 pages. The thought is also suggested that such a plan, when more fully developed, will simplify, if not entirely eliminate, the traditional foot note.

Yours respectfully,
EMIL BAENSCH.

Manitowoc, Wis.

BOOKS RECEIVED.

A history of Continental Criminal Procedure with special reference to France, by A. Esmein, Professor of the Faculty of Law of Paris, and translated by John Simpson of New York. Price, $4.50, net. Boston, Mass. Little, Brown & Company. Review will follow.

BOOK REVIEW.

BLACK ON INCOME TAXES.

This book carries the idea that bookmaking is an exceedingly up-to-date performance. Within a fortnight after the Tariff Act, containing the Income Tax Law, is approved, there is a law book in which it figures as the chief feature. Of course, it must be true that the work was done in advance of the enactment of the law, and, therefore, it is not to be argued that the work has been rushed at the sacrifice of lasting merit.

The work, indeed, should be deemed very helpful in its references to decisions under former federal income tax laws, under English acts and state income tax laws. Cognate questions, as furnishing analogy, also are discussed and, indeed, there is nothing in the work that indicates haste in preparation, but only a careful gathering of authority for practical use along with the advent of the law that was soon to appear.

The appendix contains the Federal Laws of 1913, 1909 (Corporation Excise Law), 1894 and the Civil War Income Tax Acts. Of State Income Tax Laws there are those of Wisconsin (1911), South Carolina (1902), Virginia (1908), and Oklahoma (1907). There is also found the Hawaiian Income Tax Law of 1901.

This form of taxation is about to have its trial in this coupntry and, if successful as a national law, both from the standpoint of justice and administratively, it no doubt will be taken up by many of the states. It is conceivable that nation and state greatly could help each other in this form of taxation, in the matter of getting true returns, for the pains of perjury might not be so recklessly risked, if both are offended against. Furthermore, if there is furnished a basis for the national tax, the income tax payer is put to very little trouble, if the same may serve for state purpose. The question, however, is a live one and its legal features are being studied. The book is attractive in appearance, in its strong binding of law buckram and issued from the Vernon Law Book Company, Kansas City, Mo. 1913.

GEST'S THE LAWYER IN LITERATURE.

Judge John M. Gest, of the Orphans' Court, presents a very entertaining book with introduction by Prof. John H. Wigmore, Professor of Law in Northwestern University, which is a compilation of lectures delivered by the author before a law school, a law club, law association and Greek societies, together with reprint from Yale Law Journal.

Judge Gest writes in a scholarly way and his essays in this form show, as Prof. Wigmore remarks, that: "The living side of the rules of law is often to be found in fiction alone."

To take up a work of this kind is a pleasurable relaxation and the lawyer, oppressed with the grind in his work, will be enabled both to enjoy himself in a contemplative way and come to his future tasks with a better perspective than he had, and thus, possibly, to become less wearied than he otherwise would be.

The book, in one volume, is bound in cloth, of good typography and comes from the Boston Book Company, Boston, 1913.

HUMOR OF THE LAW.

"I OBJECT!"

Comes now Sam with an objection
That he'll state;
It will cover every section
In the law books, his selection
Will excite no litle vex'ion,
And belate.

'Twill profoundly be orated,
That's his style;
Counsel patiently have waited
While at length he has debated,
The three i's he's plainly stated,
Et quis nil?

It won't be abbreviated,
Not a word;
But it will be deviated
From the rules that were created,
And suspense alleviated
When we've heard.

EDWIN THOMSON.

Kansas City, Mo.

The following incident is related of a patrolman in a city in northern Kentucky. The patrolman, recently appointed to the position, arrested a man on a charge of drunkenness one night. When placed in a cell the man seemed to be in a stupor and the jailer sent for a physician. The latter examined the prisoner and said to the jailer in a stern voice, "This man has been drugged." At this, the arresting officer turned pale and stammered, "Y-y-yes s-sir, I-I drugged him two blocks, sir, because he wouldn't walk."

"I see that you are a real estate man," said the caller, as he entered the office of a dealer, "but you are probably posted in the law enough to answer a question. If so, I am willing to pay for it."

"I give no legal opinions, sir!" was the reply.

"But this is a very simple matter."

"But you must go to a lawyer."

"But there isn't one within a mile of here."

"I can't help that."

"The question simply is—"

"Sir, I positively refuse."

"Oh, well, if you are so stiff as all that I'll have to go elsewhere, but I must confess to being a little surprised."

"You are not as surprised as I was about ten years ago," said the dealer. "A man who suspected that a neighbor was stealing his stove wood came to me and asked if he hadn't a legal right to load a stick or two with gunpowder. I told him that he had."

"And he went ahead on your opinion?"

"He did, and a week later I also went ahead. The wife of the suspected wood-stealer was a washerwoman who went out by the day. One evening my wife asked me to drop in there and engage her for the next day."

"Um."

"I was there when one of the loaded sticks exploded and blew up the stove, the kitchen, the woman, and myself, and the doctors didn't get through tinkering at me for about three months. No sir, you will get no legal opinion from me. Go to a regular lawyer and let him be blown through the window into the yard and lose his hair and eyebrows and have his legs roasted."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Act of.—A charge of the commission of an act of bankruptcy by a corporation, by making a transfer of property with intent to prefer creditors, cannot be predicated on the payment of small current bills in the usual course of business while a going concern.—In re Columbia Real Estate Co., U. S. D. C., 205 Fed. 980.

2.——Amendment.—A claim against a bankrupt's estate having been filed within the year, and having stated the true nature of the consideration, the fact that it was defective for failure, in that the proof was not made by the owner, but by his agent, without stating why it was not made by the owner, etc., did not prevent its amendment after the year had expired so as to comply with the law.—In re McCarthy Portable Elevator Co., U. S. D. C., 205 Fed. 986.

3.——Concealment of Debt.—Under Act Cong. July 1, 1898, § 17, declaring that a bankrupt will not be released from debts not duly scheduled in time for proof and allowance, unless the creditors had actual knowledge of the proceedings in bankruptcy, a discharge in bankruptcy will not release a grantee of land from liability for payment of vendor's lien notes which he assumed when acquiring the land where he concealed his assumption of the debt and scheduled neither the debt nor the land.—Raley v. D. Sullivan & Co., Tex., 159. S. W. 99.

4.——Confession of Judgment.—A judgment against a bankrupt corporation entered by confession by its president, in favor of the transferee after due of a note given by the president on behalf of the corporation to himself for back salary, held subject to attack in the bankruptcy proceeding.—In re Wenatchee-Stratford Orchard Co., U. S. D. C., 205 Fed. 964.

5.——Corporation.—A District Court within whose jurisdiction a corporation has in fact had its principal place of business for the preceding six months has jurisdiction to adjudge such corporation a bankrupt, although its articles of incorporation fix its principal place of business in another jurisdiction.—In re Wenatchee-Stratford Orchard Co., U. S. D. C., 205 Fed. 964.

6.——Gift.—A diamond engagement ring, given by a bankrupt to his fiancee, when he was insolvent and within four months prior to his hankruptcy, held recoverable by his trustee,—Pollock v. Simon, U. S. D. C., 205 Fed. 1005.

7.——Notice of Insolvency.—A finding by a court of bankruptcy that a deed executed by a bankrupt within four months prior to his bankruptcy was made when he was insolvent, as security for an antecedent indebtedness, and was accepted by the grantee with reasonable cause to believe that the bankrupt intended to thereby give a preference, held supported by the evidence.—Northern Neck State Bank v. Smith, C. C. A., 205 Fed. 894.

8.——Proof of Claim.—Claims must be proved within a year after adjudication.—In re McCarthy Portable Elevator Co., U. S. D. C., 205 Fed. 986.

9.——Review.—Where the facts upon which an order of a bankruptcy court was based were stipulated by the parties, the order involves questions of law only, and is reviewable by petition to revise.—In re J. B. Judkins Co., C. C. A., 205 Fed. 892.

10.——Schedule.—Under Bankr. Act, § 70, requiring the bankrupt to include in his schedule all of the property which prior to the filing of the petition in bankruptcy he could have transferred, or which might have been levied on and sold under judicial process, a grantor in an unrecorded deed, who becomes bankrupt, properly includes in his schedule the property conveyed thereby.—Davis v. Pursel, Colo., 134 Pac. 107.

11. **Banks and Banking**—Notice.—A bank which knew that the authority of an agent was limited to the drawing of checks in the name of the principal for spot cotton, was liable for paying checks drawn by the agent for cotton futures with knowledge of the facts or with knowledge of such facts as would put it on notice.—W. R. Miller & Co v. Hobdy, Tex., 159 S. W. 96.

12. **Bills and Notes**—Check.—A "check" is a commercial device intended to be used as a temporary expedient for actual money, and is generally designed for immediate payment, and not for circulation.—Kennedy v. Jones, Ga., 78 S. E. 1069.

13.——Marginal Figures.—Where the figures in the margin of a note do not correspond to the amount written in the body, the latter controls.—Bell v. Birmingham, Ala., 62 So. 971.

14. **Bribery**—Intent.—A person could be guilty of bribing a policeman, although the policeman had no corrupt purpose or intent, but took the bribe merely to secure evidence against the briber for the purpose of procuring his conviction; the guilt of the briber being measured by his own intent and not by the intent of the acceptor of the bribe.—Minter v. State, Tex., 159 S. W. 286.

15. **Brokers**—Exclusive Agency.—The measure of damages for breach of a contract, appointing an exclusive agent for the sale of property at an agreed compensation for each lot sold, is the loss of profits on such sales as he

could have made, except for the breach, not the full compensation for all lots sold through other agents.—Swartz v. Park, Tex., 159 S. W. 338.

16.——Producing Purchaser.—Where, in an action for brokers' commissions, it appeared that the purchasers refused to deposit earnest money as required by the contract which was for that reason never performed, the brokers had not succeeded in producing a purchaser willing and ready to buy and were therefore not entitled to commissions.—Oswald Realty Co. v. Broussard, Tex., 159 S. W. 153.

17. **Carriers of Goods**—Draft With Bill of Lading.—Where a consignor delivers goods, consigned to his order, to a carrier, and the bill of lading is indorsed in blank by him and attached to the draft for the price, drawn on the person to be notified of the arrival of the goods, and the amount of the draft is deposited, and credited by the bank to the consignor's account, the bank acquires title to the shipment as against a subsequent attaching creditor of the consignor.—Alexander, Smith & Co. v. First Nat. Bank, Ga., 78 S. E. 1071.

18.——Estoppel.—A contract for transportation of interstate freight at a less rate than that prescribed in the schedules on file with the Interstate Commerce Commission does not bar the carrier's right to recover the difference.—Illinois Cent. R. Co. v. Segari & Co., U. S. D. C., 205 Fed. 998.

19.——Limiting Liability.—Where the liability of carriers was fixed by a through contract with the initial carrier, the shipment being an interstate one, a connecting carrier cannot limit its liability by issuing a new bill of lading; there being no consideration for such new contract.—Atchison, T. & S. F. Ry. Co. v. Word, Tex., 159 S. W. 375.

20. **Carriers of Passengers** — Variance. — Where a passenger alleged that the train was in motion when she was ejected therefrom, proof that it was not in motion did not constitute material variance.—Louisville & N. R. Co. v. Penick, Ala., 62 So. 965.

21. **Chattel Mortgages**—Constructive Notice. —Where a chattel mortgagee takes mortgage in anticipation of removal of property to another county, to which it is removed with his consent in a few days, and he files his mortgage in the county of the original situs 20 days thereafter but does not file it in the county to which it is removed, the filing is not constructive notice.—Cowart v. Allen, Okla., 134 Pac. 66.

22.——Holder of Note.—The purchaser of a note secured by a chattel mortgage became the owner of the note and mortgage, and had the right to foreclose it without a transfer indorsed on the mortgage.—Erdman v. Erdman, Ark., 159 S. W. 201.

23.——Priority.—A Chattel mortgagee whose mortgage is duly acknowledged and recorded has a contractual and statutory lien prior and paramount to any subsequent lien created by contract of any kind to which he is not a party or to which he does not give his consent, actual of implied.—Ellison v. Tuckerman, Colo., 134 Pac. 163.

24. **Contracts**—Certainty.—An oral contract for working a mine, phich provided that the work was to continue until the mineowner began shipping from the mine, is capable of being rendered certain as to its termination, by proof of the date when shipping began, and is not void for uncertainty.—Barney Coal Co. v. Davis, Ala., 62 So. 985.

25.——Time of Essence.—Where time is of the essence of a contract, strict compliance will be required; but a party will not be permitted by conduct indicating a waiver of the time requirement, to force unreasonable loss on the other party.—St. Clair v. Hellweg, Mo., 159 S. W. 17.

26. **Corporations**—Public Service Company.—That governmental regulations are confiscatory and unduly arbitrary and burdensome does not justify a public service company in arbitrarily discontinuing its service to the public.—Gainesville v. Gainesville Gas & Electric Power Co., Fla., 62 So. 919.

27.——Private Instruction.—The manager of sales of a manufacturing corporation has power to contract for the selling of its wares, and persons contracting with such corporation are not bound to know of a by-law limiting the power of such manager to make the customary contracts.—Monarch Portland Cement Co. v. P. J. Creedon & Sons, Nebr., 142 N. W. 906.

28.——Punitive Damages.—A railroad corporation cannot be held liable in punitive damages for the gross negligence of its servants—Great Western Ry. Co. v. Drorbaugh, Colo., 134 Pac. 168.

29.——Transfer of Stock.—A purchaser of stock from a stockholder for value and without notice of any claim of the corporation against the stock is entitled as a matter of right to have the stock transferred on the books of the corporation and new certificates issued therefor, and he has a complete remedy to compel the transfer or to recover damages from the corporation for refusal to make the transfer.—Bankers' Trust Co. of St. Louis v. McCloy, Ark., 159 S. W. 205.

30. **Criminal Evidence**—Res Gestae.—Where the defendant had made threats against the deceased and another person, evidence that immediately after the shooting of the deceased defendant entered a room and shot at the other person he had threatened was admissible as a part of the same transaction.—Conwill v. State, Ala., 62 So. 1006.

31. **Criminal Law**—Accomplice.—A person cannot be an accomplice to the commission of a crime or convicted as such unless there is a principal shown to be guilty of the main offense. —Kauffman v. State, Tex., 159 S. W. 58.

32.——Conviction of Lower Degree.—A conviction of manslaughter is on a new trial available as an acquittal of murder.—Rigell v. State, Ala., 62 So. 977.

33.——Principal.—One who was not present at the commission of a crime cannot be convicted as a principal unless, at the time of its commission, he was doing some act in furtherance of a common design to commit the offense.—Silvas v. State, Tex., 159 S. W. 223.

34. **Damages**—Punitive.—Exemplary damages can be awarded only where defendant is actuated by fraud or malice, or is guilty of such gross negligence as indicates a reckless disregard for the rights of others.—St. Louis, I. M. & S. Ry. Co. v. Freeland, Okla., 134 Pac. 47.

35. **Divorce**—Constructive Service.—A judgment of divorce, based on constructive service to a nonresident defendant, not being within the provisions of the federal Constitution requiring each state to give full faith and credit to the judicial proceedings of every other state, may be collaterally attacked for fraud.—Solomon v. Solomon, Ga., 78 S. E. 1079.

36. **Eminent Domain**—Damages.—Though a sand bank on property condemned for a reservoir, before the location of the reservoir, was valuable solely because necessary in the construction of the reservoir, it was proper to take such value into consideration in fixing the compensation.—In re Water Supply of City of New York, 143 N. Y. Supp. 141.

37. **Estoppel**—Pleading.—The defense of estoppel in pais need not be specially pleaded.—Merck v. Merck, S. C., 78 S. E. 1027.

38. **Evidence**—Hearsay.—Where the complaint alleged that the plaintiff was in the station at the invitation of the agent to wait until he bought his ticket, a question as to the statement made by the ticket agent did not call for hearsay testimony.—Louisville & N. R. Co. v. Kay, Ala., 62 So. 1014.

39.——Judicial Notice.—The Court of Criminal Appeals knows as a matter of common knowledge that the fire limits in a city include the thickly settled and business parts of the city.—Ex parte Bradshaw, Tex., 159 S. W. 259.

40.——Res Gestae.—A declaration by a boy, who had been injured by a train, made to a witness immediately upon his arrival at the scene of the accident, which was half a minute after he heard a brakeman call that they had run over a man, was admissible as part of the res gestae.—Magill v. Southern Ry. Co., S. C., 78 E. S. 1033.

41.——Res Gestae.—Physical suffering, intentions, ill feelings, affections, and other emotions, when they are material circumstances to establish an issue, may be established by proof of declarations contemporaneous with such intentions or feelings as a part of the res gestae.—Scott v. Townsend, Tex., 169 S. W. 342.

42. **Executors and Administrators**—Conversion.—Property of a decedent which is changed or altered by the executor or administrator is regarded in law and equity as having been administered, though such alteration amounts to a conversion of the property by the personal representative to his own use.—Brown v. Brown, W. Va., 78 S. E. 1040.

43. **Factors**—Apparent Title.—Where a cotton factor received cotton in good faith for sale from a person purporting to be the true owner, and turned over the proceeds to such person in entire ignorance of the rights under a foreign mortgage, he could not be said to have knowingly asserted any claim to the property or proceeds against the owner, and there was no conversion.—J. T. Fargason Co. v. Ball., Tenn., 159 S. W. 221.

44. **Fixtures**—Separability.—Where the owner of a lot on which a house was located, during several years of ownership recognized the house as belonging to another, and paid rent for it, it constituted the house personal property, and susceptible of separation and removal from the realty at the will of the parties.—Clayton v. Phillipp, Tex., 159 S. W. 117.

45. **Frauds, Statute of**—Charity.—An oral promise to make a donation to a charitable corporation is not "a subscription for stock" of a commercial corporation within the rule that such subscriptions are "contracts for the sale of goods" within the statute of frauds—Young Men's Christian Ass'n v. Estill, Ga., 78 S. E. 1075.

46.——Growing Timber.—Growing timber must be conveyed by deed; any other mode of transfer being within the statute of frauds.—Griffith v. Ayer-Lord Tie Co., Ark., 159 S. W. 218.

47. **Fraudulent Conveyances**—Bulk Sales Act.—The "sale in bulk" act held not to apply to a transaction whereby a firm of two persons in the grocery business sold a two-thirds interest to two other persons, and one original partner retired, and the business was continued in the name of the new firm, composed of the remaining original partner and the two purchasers.—Yancey v. Lamar-Rankin Drug Co., Ga., 78 S. E. 1078.

48.——Subsequent Creditor.—That money may have been obtained from a subsequent creditor to pay off debts existing when a gift was made by the insolvent debtor will not render the gift void as to such creditor, where the debtor acts honestly and without intent to defraud.—Lane v. Newton, Ga., 78 S. E. 1082.

49. **Habeas Corpus**—Custody of Child.—An oral agreement whereby the father of a minor child surrendered its custody to a third person is not void as against public policy but will be enforced on habeas corpus for the benefit of the minor.—Ex parte Swall, Nev., 134 Pac. 96.

50. **Homicide**—Involuntary Manslaughter.—One who intentionally points at another a gun, which is unintentionally discharged, killing the other, is guilty of at least involuntary manslaughter.—Bynum v. State, Ala., 62 So. 983.

51.——Reasonable Appearance of Danger.—Deceased having become the assailant by drawing his pistol, defendant was not required to wait, but could act on the reasonable appearance, and do so promptly.—Rigell v. State., Ala., 62 So. 977.

52. **Homestead**—Conveyance.—A contract for the sale of a homestead belonging to husband and wife, in which the wife did not join, was void and did not thereafter become valid by their ceasing to occupy the land as a home; no other homestead having been acquired.—Ward v. Walker, Tex., 159 S. W. 320.

53. **Husband and Wife**—Community Property.—Where land was reconveyed to a husband during the marriage, it would be presumed that it became community property.—Wauhop v. Sauvage's Heirs, Tex., 159 S. W. 185.

54. **Infants**—Waiver of Process.—An infant defendant cannot waive issuance and service of summons, nor can his guardian or any other person do so for him.—Iowa Land & Trust Co. v. Dawson, Okla., 134 Pac. 39.

55. **Injunction**—Irreparable Injury.—Although an ordinance purporting to have been adopted under the initiative provisions of a charter, and to regulate the rates of fare of street railway companies, was void, held that as it stood on the minutes of the city as a law the enforcement of which would irreparably injure a company's business and property rights, the company was entitled to enjoin its enforcement.—City of Dallas v. Dallas Consol. Electric St. Ry. Co., Tex., 159 S. W. 76.

56.——Mandatory.—A public utility corporation may be required by a mandatory injunction to perform its duties to the public.—City of Gainesville v. Gainesville Gas & Electric Power Co., Fla., 62 So. 919.

57. **Insane Persons**—Ratification.—The deed of an insane person is not void but only voidable, since it may have been executed during a lucid interval, or ratified on the incompetent's regaining sanity.—Porter v. Brooks, Tex., 159 S. W. 192.

58. **Insurance** — Additional. — Where, subsequent to issuance of policy additnonal insurance was obtained on property without notice to the insurer and consent, contrary to a provision of the policy, the policy, became invalid in the absence of waiver or estoppel.—Tilton v. Farmers' Ins. Co. of Town of Palatin, 143 N. Y. Supp. 107.

59.——Change of Beneficiary.—While the objects of fraternal insurance associations are different from those of ordinary life insurance companies, the assured has no greater power to change the beneficiary in one case than in the other, except as reserved to him by the laws of the state under which the insurance was written, or the by-laws of the association, or the terms of the certificate.—Finnell v. Franklin, Colo., 134 Pac. 122.

60.——Forfeiture.—Under an accident policy, providing that notice of insured's death must be given to the insurer "as soon as may be reasonably possible," but not providing for forfeiture of the policy for failure to give such notice, failure to give the notice for 18 days will not, as a matter of law, forfeit the policy.—Columbian National Life Insurance Co. v. Miller, Ga., 78 S. E. 1079.

61.——Waiver.—A provision that the insured shall give opportunity to adjusters to examine the property is waived, where they made no examination for 10 days after request by the insured and disclaimed all liability under the policy.—Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co., Tex., 159 S. W. 172.

62.——Waiver.—Where an insurance adjuster, after being informed that there was a chattel mortgage on the property, completed the adjustment, and deducted the amount of the mortgage and made indorsements on the policy to such effect, the insurance company was estopped to claim that the mortgaging of the property in violation of a provision of the policy forfeited the insurance.—Western Reciprocal Underwriters' Exchange v. Coon, Okla., 134 Pac. 22.

63. **Intoxicating Liquors**—Unlawful Possession.—The defendant's possession of large quantities of intoxicating liquor and shipments made to him about the time alleged in the indictment are proper evidence in a prosecution for keeping prohibited liquors for sale.—Watson v. State, Ala., 62 So. 997.

64. **Judgment**—Collateral Attack.—A judgment rendered at a time when the court had no jurisdiction over the subject-matter is void and open to collateral attack.—Waterman Lumber & Supply Co. v. Robins, Tex., 159 S. W. 360.

65.——Defaulter.—A default judgment will not be set aside unless there is a meritorious defense.—Delaware Ins. Co. v. Hutto, Tex., 159 S. W. 73.

66.——Default.—There is no material distinction between the effect of a judgment by default and a judgment nil dicit.—Barnard v. Irwin, Ala., 62 So. 963.

67.——Foreclosure.—A personal judgment in a foreclosure suit against nonresident defendants brought in by constructive service who do not appear, while void, does not invalidate that part of the judgment which forecloses the mortgage, and directs a sale of the property.—Audas v. Highland Land & Building Co. of Dayton, Ky., C. C. A., 205 Fed. 862.

68.——Non Obstante Veredicto.—In an action at law, the court cannot render a judgment for the defendant notwithstanding the verdict, because it is against the weight of the evidence, unless there is a total want of evidence as to some material issue.—Davies v. Rose-Marshall Coal Co., Wash., 134 Pac. 180.

69. **Landlord and Tenant**—Common Hallways. —A landlord of an apartment house is bound to keep the common hallways and stairways in good repair.—Hicks v. Smith, 143 N. Y. Supp. 136.

70.——Estoppel.—Statement of landlord that he was not going to advance tenant any supplies to make a crop held not to estop him from acquiring a lien on the crop as against a chattel mortgagee of the crop.—M. C. McAdams & Co. v. Smith, Ala., 62 So. 1000.

71.——Remedy at Law.—An injunction will not lie to restrain a landlord from interfering with a tenant's possession, under his contract, as the tenant has an adequate remedy by proceedings in forcible entry and detainer.—Gvosdanovic v. Harris, Okla., 134 Pac. 28.

71. **Libel and Slander**—Aggravation.—Where defendant pleads the truth of the charge and fails to establish same, such plea may be considered in aggravation of damages, and any evidence tending to show that he made such plea in good faith may be considered in mitigation of exemplary damages.—Krulic v. Petcoff, Minn., 142 N. W. 897.

73. **Limitation of Actions**—Fraudulent Concealment.—Where defendant's grantee who purchased a vendor's lien thereon concealed his assumption of the debt so that plaintiff could not have discovered it by any diligence, the grantee's active fraud will prevent the running of the statute of limitations.—Raley v. D. Sullivan & Co., Tex., 159 S. W. 99.

74. **Master and Servant**—Delegatable Authority—The statutory duty of a coal mine owner to provide sufficient ventilation for the employes in the mine is one which cannot be delegated.—Davies v. Rose-Marshall Coal Co., Wash., 134 Pac. 180.

75.——Negligent Order.—A negligent order may result from the failure to refrain from giving an order under circumstances that will probably result in injury as well as from the giving of a negligent order.—Harbison-Walker Refractories Co. v. Ross., Ala., 62 So. 1009.

76.——Vice Principal.—One to be a "vice principal" must possess authority not only to superintend, control, and command employes, but also to hire and discharge them.—Kirby Lumber Co. v. Williams, Fla., 159 S. W. 309.

77. **Mortgages**—Estoppel.—Where a grantee in a deed absolute in form, but in fact a mortgage to secure a debt, agreeing with the consent of the grantor to sell the property to a third person for a sum in excess of the debt, refused to permit a sale, he must be deemed to have refused the tender of the debt secured, and he was entitled only to a judgment for that amount without interest from the refusal to the adjudication.—Dubois v. Bowles, Colo., 134 Pac. 112.

78.——Maxims.—The maxim, "Once a mortgage always a mortgage," applies to a deed given as security, and it will remain a mortgage unless changed by a new contract on adequate consideration, and subsequent writings not resting on a valuable consideration, admitting a different relation, do not change it.—Hudkins v. Crim, W. Va., 78 S. E. 1043.

79. **Municipal Corporations**—Contractor.—A contract by which the city assumes full responsibility for injuries caused by the construction of a sewer does not prevent one who was injured from suing the contractor, either separately or jointly with the city, for negligence in not guarding the trench.—Dow v. City of Oroville, Cal., 134 Pac. 197.

80.——Due Care.—Persons engaged in work upon public streets are not bound to exercise the same degree of care and diligence in avoiding accidents as pedestrians who use the street merely as a medium of locomotion.—Graves v. Portland Ry., Light & Power Co., Ore., 134 Pac. 1.

81. **Negligence**—Comparative Negligence.—The doctrine of "comparative negligence" is that plaintiff may recover though guilty of contributory negligence, if such negligence is slight, and defendant's negligence is gross in comparison.—Hailey-Ola Coal Co. v. Morgan, Okla., 134 Pac. 29.

82. **Novation**—Discharge.—Where on defendant announcing he cannot perform his contract to convey land to plaintiff because owning only

half of it, and co-owner being unwilling to sell at the price, plaintiff makes new contracts, one with each owner for his half, they, in the absence of provision to the contrary, are a substitute for the first and, being performed, discharge liability on it.—McKay v. Fleming, Colo., 134 Pac. 159.

83. **Partnership**—Nontrading Firm.—The members of a trading firm have authority to borrow money in the firm name for firm purposes, and to pledge firm property, but the members of a nontrading firm have no implied authority to borrow money.—Miller v. McCord, Tex., 159 S. W. 159.

84. **Principal and Agent.**—Circumstantial Evidence.—Agency may be established by circumstantial evidence.—Sargeant v. Barnes, Tex., 159 S. W. 366.

85.——Estoppel.—One cannot assert want of authority of his agent to make a contract; he having accepted it and acted on it and permitted its full performance.—McKay v. Fleming, Colo., 134 Pac. 159.

86. **Principal and Surety**—Surety Company.—Where a building contract provided that advances made by the owner should not be deemed an acceptance and did not require the owner to inspect the quality of the work, or that the architect should do so before the owner had made the advancements, the owner making the advancements could recover from the contractor's surety the amount paid an architect for services in supervising the rebuilding of defective work done by the contractor.—Welsh v. Warren, Tex., 159 S. W. 106.

87. **Railroads**—Jury Question.—Whether a railroad of any kind is negligent in failing to give proper signals in operating car or train across a public highway is a question of fact, unless the facts are such that the only inference can be drawn therefrom.—Hudson v. Southwest Missouri R. Co., Mo., 159 S. W. 9.

88. **Receiving Stolen Goods**—Alibi.—Accused held to have received stolen goods when they were placed in his barn pursuant to his directions, and hence it was proper to refuse a charge on alibi, although there was evidence that he was not present when they were placed in the barn.—Kaufman v. State, Tex., 159 S. W. 58.

89.——Burden of Proof.—To establish the crime of receiving stolen property it must appear that the property was stolen; that the defendant bought, received, or concealed it, or aided in so doing; that he knew at the time it was stolen; and that he had no intention of returning it to the owner.—Fulton v. State, Ala., 62 So. 959.

90. **Release**—Burden of Proof.—Where, in a suit on notes, the defendant pleaded a contract with the owner of the notes as a satisfaction, it was error to permit defendant to excuse his failure to comply with the contract by testifying that he had not been requested to do so, as the burden of proof was on defendant to show the contract and his compliance with it.—Holderman v. Reynolds, Tex., 159 S. W. 67.

91. **Removal of Causes**—Separable Controversy.—Where the petition, in an action against several carriers, alleged a breach by one carrier, a nonresident, of a parol contract, and averred facts showing a violation by the carriers of their common-law liability, the nonresident carrier was not entitled to a removal of the action to the federal court, on the ground that the controversy was separable.—St. Louis, I. M. & S. Ry. Co. v. West Bros., Tex., 159 S. W. 142.

92. **Sales**—Express Warranty.—An express warranty of personalty will exclude an implied warranty on the same or a closely related subject, but not an implied warranty on an entirely different subject.—W. D. Barber & Son v. Singletary, Ga., 78 S. E. 1100.

93.——Rescission.—Where a contract for the purchase of yarn for manufacturing purposes required successive deliveries, the discovery of a secret defect in the yarn after a number of deliveries had been made, not ascertainable by ordinary inspection or tests, held to entitle the purchaser to rescind and refuse to accept further deliveries.—Roxford Knitting Co. v. Hamilton Mfg. Co., C. C. A., 205 Fed. 842.

94. **Trover and Conversion**—Bona Fide Purchaser.—Where defendant bought ties made of timber, the legal title of which was in plaintiff, defendant is guilty of conversion, even though a bona fide purchaser, and plaintiff may recover their value.—Griffith v. Ayer-Lord Tie Co., Ark., 159 S. W. 218.

95. **Trusts**—Action by Cestui Que Trust.—It is not necessary that demand be made on a trustee to bring suit to quiet title to the trust property, before the beneficiaries can bring such a suit, where the trustee has neglected the trust, and is made a party defendant for the purpose of enforcing the trust.—Eagan v. Mahoney, Colo., 134 Pac. 156.

96.——Statute of Frauds.—An oral agreement between two persons to purchase land jointly created a trust in the land when purchased by one of the parties under the agreement notwithstanding the statute of frauds.—Sachs v. Goldberg, Tex., 159 S. W. 92.

97. **Vendor and Purchaser**—Constructive Notice.—A purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise on the face of any deed which forms an essential link in his chain of title.—Loomis v. Cobb, Tex., 159 S. W. 305.

98.——Estoppel.—Where a purchaser of a lot has full knowledge at the time of the purchase that a house located thereon belongs to a third person, and is not intended to be conveyed by the deed, he acquires no greater rights or interest in the house than his grantor possessed.—Clayton v. Phillips, Tex., 159 S. W. 117.

99.——Estoppel.—A grantor of land cannot assert title as against his grantee.—Raley v. D. Sullivan & Co., Tex., 159 S. W. 99.

100.——Possession on Notice.—Where neither the actual occupant of premises nor the owner thereof nor her agent misled a purchaser, but the purchaser was informed of the owner's claim, the possession of the premises was sufficient notice to put the purchaser on inquiry, and he could not become a purchaser without notice.—Davis v. Pursel, Colo., 134 Pac. 107.

101.——Practical Construction.—Where a memorandum of a sale did not state that an abstract was to be furnished, but the vendor furnished an abstract, to which the purchaser made objection, and both parties testified that an abstract showing perfect title was to be given, the construction placed upon the contract by the parties shows that such an abstract was to be given.—St. Clair v. Hellweg, Mo., 159 S. W. 17.

102. **Wills**—Conditional Bequest.—Where a will made a bequest to a certain person for her support "while unmarried," her marriage terminated her interest in the estate, and such interest was not revived by the subsequent death of her husband; the words quoted meaning while or so long as she remained unmarried.—Thornquist v. Oglethrope Lodge No. 1, Ga., 78 S. E. 1086.

103.——Construction.—A devise to a testator's daughter and her children held to vest title in her and such of her children as were living at the date of the will and at the death of the testator, as tenants in common, though a subsequent item of the will provided that certain of testator's other grandchildren should be paid a certain sum by the daughter and her children in lieu of their proportionate part of the real estate.—Whitfield v. Means, Ga., 78 S. E. 1067.

104.——Mutual Wills.—A will, made under an agreement for mutual wills, is valid as evidence of the contract, even though it has been revoked by a later will.—In re Burke's Estate, Ore., 134 Pac. 11.

105.—Undue Influence.—The fact that a will was never revoked, although testator lived two years after its execution, was admissible as a circumstance tending to refute the claim of contestant, a daughter, that its execution was the result of undue influence.—Scott v. Townsend, Tex., 159 S. W. 342.

106.——Void Adoption.—Instrument attempting to adopt a child, but ineffective as such, held upheld as a contract to leave a portion of the property of the makers to such child.—Thompson v. Waits, Tex., 159 S. W. 82.